

No. 15,270

United States Court of Appeals
For the Ninth Circuit

ROBERT AZEVEDO, IRENE KERSHAW and
PAUL KERSHAW, JR.,

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

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STATEMENT OF FACTS.

John Azevedo prior to 1945 was the owner of the real property and the improvements upon which a winery was located and which had been leased by John Azevedo to persons other than the petitioners herein, to operate and maintain said winery.

In the month of July, 1945, John Azevedo discontinued his lease arrangement with others and commenced the operation as a sole proprietor of the winery on the land owned by him, and did business under the firm name and style "Mills Winery". John Azevedo held all the necessary basic permits to engage in business as a winery, distiller, and seller of wine at wholesale as required by the various government authorities.

On or about August 1, 1945, John Azevedo agreed orally to sell the winery to Robert Azevedo and Paul Kershaw, Jr., at an "adjusted cost". The oral agreement was later reduced to written agreements dated December 1, 1945.

Commencing August 1, 1945, Paul Kershaw, Jr., and Robert Azevedo conducted operations at the Mills Winery in connection with the crushing of grapes for the manufacturing of wine and conducted the same as copartners.

The partnership went into operation immediately after and on August 1, 1945, purchased grapes for the crushing for the manufacturing of wine from monies that were borrowed from the Capital National Bank at Sacramento. This money was borrowed from the bank through arrangements made by John Azevedo. The note was signed by John Azevedo and the total capital necessary for the formation of the copartnership and for the purchase of the grapes for manufacturing of wine was obtained from the Capital National Bank.

The copartnership that was entered into between Robert Azevedo and Paul Kershaw, Jr., on August 1, 1945 came into existence before any wine was made from the 1945 crush. The inventory, namely, the wine that came into existence from the 1945 crush, was the inventory of the copartnership of Robert Azevedo and Paul Kershaw, Jr. The monies borrowed from the Capital National Bank amounted to Four Hundred and Forty Thousand Dollars (\$440,000.00) and it financed the purchase of the grapes for the 1945

crush One Hundred Per Cent (100%). This loan was obtained by John Azevedo for the benefit of the copartnership which was then in existence between Robert Azevedo and Paul Kershaw, Jr., since said copartnership had no line of credit.

After the formation of the copartnership on August 1, 1945, which partnership was by oral agreement, the partners agreed to pay to John Azevedo the cost as "adjusted" \$110,000.00 for the winery. Paul Kershaw, Jr., when the money was made available to the copartnership by the Capital National Bank of Sacramento, went out and bought grapes, and Robert Azevedo was the wine maker. The crush was finished about in the month of December, 1945 and it was at that time that John Azevedo, the father of Robert Azevedo, requested the execution of written instruments to evidence the obligation of the copartners to him that had been incurred in August, 1945. When the crush was completed, a certain amount of work was done by the copartners to finish the wine and to prepare it for market. Markets were sought in January and February of 1946 by the copartners to dispose of the wine in bulk, and it was then that the copartners decided to organize a California corporation, which was done, and they transferred all the assets and the liabilities of the copartnership to the corporation and had prepared a closing income tax return.

At all times prior to the date of the incorporation of Mills Winery on March 4, 1946, Paul Kershaw, Jr., was the partner actively engaged in the development of future sales of wine, and after March 4,

1946, Paul Kershaw, Jr., when contacting fruit processors or wine brokers in connection with the sale of wine, represented himself as a member of the corporation known as Mills Winery and that he was Vice President in charge of sales.

During the operation of the copartnership of Paul Kershaw, Jr., and Robert Azevedo, books and records of the copartnership were maintained, wherein all of the financial transactions and activities of the copartnership were entered in said books, and the books were closed for the copartnership upon the termination thereof and a closing and final partnership income tax return was prepared. The partnership return indicated that the partnership had no inventory at the beginning of its year and had a closing inventory of \$445,467.09. This was the opening inventory of the corporation on March 4, 1946.

That during the operation of the copartnership from August 1, 1945 to March 1, 1946 and after the incorporation of Mills Winery on March 4, 1946 and to and including August 1, 1946, there was a single bank account maintained in the Capital National Bank at Sacramento, California, which account was a commercial account and used for the business operations of the partnership during its existence and for the corporation from March 4, 1946 to August 1, 1946. That at all times from August 1, 1945 and to August 1, 1946, John Azevedo had the sole authority to sign checks and withdraw funds from the bank. All monies that were withdrawn by John Azevedo from the bank account prior to March 4, 1946 were used to pay the

obligations of Paul Kershaw, Jr., and Robert Azevedo as copartners. All monies withdrawn by John Azevedo after March 4, 1946 from the said bank account and all expenditures that were made thereafter were made for the benefit of Mills Winery, a California corporation, which came from the same bank account and was drawn upon by John Azevedo. That all bank loans, warehouse obligations and expenditures for improvements, alterations and additions made on the winery premises and the equipment thereon that were paid for prior to August 1, 1946 were paid for by check drawn by John Azevedo from this same bank account, and that all payments that were made after August 1, 1946 were paid by Paul Kershaw, Jr., as an officer of Mills Winery from this same bank account.

When the corporation, Mills Winery, was organized the corporation opened corporate books and accounts, and the corporation purchased all of the wine that was in existence on March 1, 1946 from the copartners, Robert Azevedo and Paul Kershaw, Jr., and assumed the obligations of the copartnership in connection with the crush of grapes for the manufacturing of wine, the loan obtained from the Capital National Bank of Sacramento and the adjusted cost of the winery premises.

After the corporation was organized Paul Kershaw, Jr., contacted various wine brokers and other persons interested in the wine industry in connection with the purchase of bulk wine, representing himself as Vice President of Mills Winery, a California corporation, and that the corporation had certain types of wines

that could be sold in bulk. The persons whom Paul Kershaw, Jr., contacted after the wine was in a condition to be sold by reason of the finishing of the same, making it ready for the market, were some of the same people who had been previously contacted by Paul Kershaw, Jr., as a copartner with Robert Azevedo that was in existence prior to March 4, 1946. The relationship of Paul Kershaw, Jr., as a Vice President of a corporation as distinguished from a partner with Robert Azevedo in an organization that was likewise doing business under the firm name and style of Mills Winery was brought to the attention of those people who had dealt with Paul Kershaw, Jr., previously as a copartner with Robert Azevedo. Substantially, all the wine that was made from the 1945 crush was sold by the corporation before the end of June, 1946, sales commencing after March 4, 1946. All of the sales of wine that were made during that period were recorded as corporate gross profit in the books and records of the corporation and all expenditures that were made from March 4, 1946 were paid as corporate expenditures and so reflected in the corporate books. The corporate books from March 4, 1946, the date of incorporation, to this date, have been without interruption reporting all sales, expenditures and assets of the corporation, Mills Winery. The corporation, on or about March 4, 1946, opened corporate books and accounts which reflected the corporate gross profit made from the sales of wine from March 4, 1946 to and including this date.

Paul Kershaw, Jr., and Robert Azevedo as copartners did not make any application to the Alcoholic Tax Unit of the Bureau of Internal Revenue for the issuance of any permits to engage in the business of a winery and/or distillery, nor did they as individuals doing business as copartners apply to the State of California for any permits in order to engage in said business as a winery or distillery. A basic permit was applied for by Mills Winery, a California corporation, on May 3, 1946, and to the State of California for the necessary California licenses and permits. On August 7, 1946, the permits authorizing Mills Winery, a California corporation, to manufacture wine and to distill fruit spirits, were issued by the Federal Alcoholic Tax Unit and the California State Board of Equalization. Prior to August 7, 1946, the permits to manufacture wine and to distill fruit spirits were in the name of John Azevedo, an individual.

Upon the organization of the corporation, the main activity of the corporation from March 4, 1946 to the latter part of June, 1946 was the sale of the wine inventory that had been transferred by the partnership on or about March 4, 1946 to the corporation. The total inventory that was owned by the corporation by reason of its purchase from the copartnership was obtained at one single transaction by the assignment and transfer of the same by the copartners, Paul Kershaw, Jr., and Robert Azevedo, to the corporation, and that the inventory was obtained by the corporation at this one instance and was sold to various persons in bulk until it was substantially disposed of in June, 1946.

After June, 1946, and in the months of July and August, prior to the issuance of the basic permits to the corporation, the principal activity of the corporation was attempting to purchase grapes for the 1946 crush which could be carried on by the corporation as a winery and distillery of fruit spirits after it had received its basic permits. The corporation did not, from March 4, 1946, until its basic permit was issued, engage in any manufacturing of wine or distilling of fruit spirits. It merely sold and offered for sale bulk wine which was in its bonded warehouse.

After March 4, 1946, the date of incorporation, the corporation, Mills Winery, in addition to the sale of wine, carried on certain other corporate activities in connection with the corporate affairs, and held meetings of the Board of Directors. Contracts were entered into by the corporation after March 4, 1946 and prior to August 7, 1946, wherein the corporation agreed with various persons relating to obligations and covenants in connection with the corporate activities; employees were hired and responsible managing employees were retained to represent the corporation with various fruit processors, wine manufacturers and distillers, who were interested in or connected with the fruit processing industry.

After the transfer of the assets of the copartnership to the corporation and the liabilities of the copartnership to the corporation at the time of its incorporation, the wine which was the inventory of the corporation at the commencement of the corporation, was sold, and from these profits there was paid the liabilities

so assumed by the corporation, the liabilities directly incurred after incorporation, and there was paid to John Azevedo, a creditor of the corporation, the total sum of One Hundred and Ten Thousand Dollars (\$110,000.00). These payments to John Azevedo were made in the following manner:

March 22, 1946	\$ 5,000.00
April 17, 1946	10,000.00
June 24, 1946	45,000.00
July 4, 1946	50,000.00

The last payment was made to John Azevedo, as above mentioned, on July 4, 1946, and he was still on the premises when paid, having stayed on the premises at the request of the corporation officers, namely, Robert Azevedo and Paul Kershaw, Jr., in order to assist in advice and construction of various improvements on the winery premises that the winery contemplated and did eventually complete.

On September 18, 1946, the corporation, Mills Winery, applied to the Commissioner of Corporations, State of California, for the issuance of 20,000 shares of the capital stock of said corporation at a par value of One Hundred Dollars (\$100.00) per share, or an aggregate par value of Two Million Dollars (\$2,000,000.00). On October 2, 1946, a permit was issued by the Commissioner of Corporations of the State of California for the issuance of 20,000 shares at One Hundred Dollars (\$100.00) par value, and the corporation did immediately thereafter issue 10,000 shares of the capital stock each to Paul Kershaw, Jr., and Robert Azevedo. At the time the application was

made before the Commissioner of Corporations, Mills Winery had already received its basic permits from the various government authorities, and had been since on or about the 21st day of June, 1946, the named grantee to the real property upon which the winery premises were located.

For the issuance of stock the purchasers, namely, Robert Azevedo and Paul Kershaw, Jr., were to pay to the corporation the sum of Fifty-Five Thousand Dollars (\$55,000.00) each, or a total sum of One Hundred and Ten Thousand Dollars (\$110,000.00). The stock that was authorized to be issued was paid for by the purchasers, namely, Robert Azevedo and Paul Kershaw, Jr., by way of a loan, in that they each borrowed Fifty-Five Thousand Dollars (\$55,000.00) from the corporation which was used at the time for the issuance of stock to Robert Azevedo and Paul Kershaw, Jr.; that is, in consideration for the issuance of the stock One Hundred and Ten Thousand Dollars was paid by Paul Kershaw, Jr., and Robert Azevedo to the corporation. Stock was therefore issued by the corporation to Paul Kershaw, Jr., and Robert Azevedo in equal amounts, namely, Ten Thousand (10,000) shares each, for one Hundred and Ten Thousand Dollars (\$110,000.00), the payment of which was deferred by reason of the obligation incurred by Paul Kershaw, Jr., and Robert Azevedo as evidenced by the obligation of said Paul Kershaw, Jr., and Robert Azevedo to the corporation amounting to Fifty-Five Thousand Dollars (\$55,000.00) each, or the total sum of One Hundred and Ten Thousand Dollars (\$110,000.00).

Robert Azevedo filed his 1946 United States individual income tax return on March 7, 1947. He executed a consent fixing the period of limitation upon assessment of income and profits taxes on February 26, 1952.

Paul Kershaw, Jr., filed his 1946 United States individual income tax return on March 15, 1947. Paul Kershaw, Jr., executed the consent extending the assessment period on January 22, 1952.

Irene Kershaw filed her United States individual income tax return on March 20, 1947 and she filed her consent extending the period of limitation upon assessment of income and profits tax on January 22, 1952.

SPECIFICATIONS OF ERRORS.

1. *The Tax Court erroneously found that the net earnings arising from the sale of wine from March 4 through August 6, 1946 were compensation to the petitioners under agreements dated December 1, 1945 marked Exhibits "1-A" and "2-B" in evidence respectively.*

2. *The Tax Court erred in finding that Mills Winery, a California corporation, was not the owner of an inventory of wine prior to the sale thereof and thus, the proceeds from the sales of said wine were not corporation income.*

3. *The Tax Court erred in making finding and rendering a decision based upon facts inconsistent with*

the stipulation entered into between petitioners and respondent.

4. *The Tax Court erred in not finding that the deficiencies assessed by the Commissioner of Internal Revenue were barred by the Statutes of Limitations and by finding the respondent has sustained the burden of proof under the chief issue before the Tax Court.*

I.

ARGUMENT.

ROBERT AZEVEDO AND PAUL KERSHAW, JR., AS COPARTNERS
UNDER THE FIRM NAME AND STYLE OF MILLS WINERY
WERE ENGAGED IN SUCH BUSINESS AS COPARTNERS
FROM AUGUST 1, 1945 TO MARCH 1, 1946.

It is important for the Court to note that there was a certain period of time when the taxpayers, Robert Azevedo and Paul Kershaw, Jr., were admittedly engaged in a business as copartners. This is important since the respondent chiefly relies upon the agreements that were entered into between Paul Kershaw, Jr., Robert Azevedo and John Azevedo, on December 1, 1945. (Ex. 1A and 2B; Trans. of Record, page 66.) It should be noted however that the agreements in themselves do not create any copartnership and are merely buy and sell agreements. Therefore, the copartnership that existed between Paul Kershaw, Jr., and Robert Azevedo, which is admitted by the respondent, and which likewise is admitted became effective August 1, 1945, was a result of an oral agree-

ment between the said copartners. (Trans. of Record, page 148.) The terms of the agreements dated December 1, 1945 (Ex. 1A and 2B) do not alter the admission that a partnership existed. If the contracts of December 1, 1945 were carried out in accordance with their terms it would simply mean that John Azevedo, as the owner of Mills Winery, had agreed to sell the winery for a certain price, determined in a certain manner, and that during a certain period of time purchasers, namely, the petitioners, would receive as compensation for the management of the winery, the earnings of said business during that period of time from the date of the management to the day when the individuals, namely, Robert Azevedo and Paul Kershaw, Jr., received certain permits from various governmental authorities. Thus, respondent, to be consistent, would have to take the position that the earnings of the winery during the period of time in question, namely, from March 4, 1946 to August 1, 1946, belonged to John Azevedo, and he paid over said earnings to Robert Azevedo and Paul Kershaw, Jr., for services rendered. Contrary to these written agreements, however, Robert Azevedo and Paul Kershaw, Jr., did not act as mere employees of John Azevedo but did organize a copartnership on August 1, 1945, in order to carry out the activities toward the purchase of grapes and the crushing thereof in the manufacturing of wine for eventual sale in 1946. The fact that John Azevedo, as an individual, was the only person who had a basic permit authorizing him to distill fruit spirits and manufacture wine, does not alter the ad-

mission of the respondent that a partnership was actually in existence and did conduct various activities as a copartnership in connection with the crushing of grapes and the manufacturing of wine. As a matter of fact, Paul Kershaw, Jr., as part of his activity in the copartnership, went out and purchased the grapes from the growers, and Robert Azevedo made the wine, as the wine maker, and the physical assets which had been sold and transferred by John Azevedo to the copartnership were merely incidental to the partnership activities. Nor did the licensing provisions of the *Federal Alcohol Administration Act as amended, Act of August 29, 1953, Chapter 814, 49 Stat. 977 ff 27 USCA Sec. 201* derogate from the fact that a copartnership admittedly was in existence on August 1, 1945, consisting of Robert Azevedo and Paul Kershaw, Jr., even though such copartnership had no license as may be required by said Act. The activities of the copartnership did not consist of distilling fruit spirits nor manufacturing of wine, which required a permit. The wine which was being manufactured was under the permits standing in the name of John Azevedo, as in individual, but the fruits of such activity, that is the eventual existence of an inventory of wine, belonged to the copartnership. No wine was sold until after March 4, 1946, which was the date of the incorporation of Mills Winery, which is likewise admitted by the respondent, and thus as far as the petitioners are concerned, no wine was sold by the copartnership during its lifetime. Because of this fact the partnership did not re-

quire any license to sell wine at wholesale since it was not engaged in the business of purchasing for resale, at wholesale, distilled spirits, wine or malt beverages.

The fact that John Azevedo was the sole person who could draw upon the bank account during the period of time that the copartnership was in existence as contended by the petitioners, namely, from August 1, 1945 to March 1, 1946, does not derogate from the admitted existence of the copartnership. The control of such funds by reason of John Azevedo being the sole person being entitled to draw upon same, in no manner affects the admitted existence of the copartnership since it is likewise admitted that this bank account was used to pay all the obligations of the copartnership while in existence. The right of John Azevedo to draw upon the account of the copartnership was nothing more than a protective provision for John Azevedo which was used in order to prevent any dissipation of monies coming into the hands of the copartners while John Azevedo was concerned because of the obligation that was owed to him when the assets of the winery were sold to the copartners on August 1, 1945. Therefore, notwithstanding the agreements of December 1, 1945, the evidence is uncontradicted that Robert Azevedo and Paul Kershaw, Jr., did as copartners commence certain activities in connection with the crushing of grapes for the manufacturing of wine on August 1, 1945.

The validity of the copartnership and the creation thereof are dependent upon the laws of the State of California, and this court is bound by the laws of the

State of California as to whether a copartnership in fact existed.

Easton v. George Wostenhelm & Son, 137 Fed. 524;

Vogel v. Bankers Building Corp., 112 Cal. App. 2nd 160.

It may be wondered by the Court why the petitioners have spent any time on the argument that the petitioners were or were not copartners, since the admissions of the respondent admit the existence of the copartnership. However, it is important to note that the relationship between the petitioners, Kershaw and Azevedo, as copartners was stipulated to and admitted as has hereinbefore been set forth in this first subdivision of Petitioners' Argument by the Stipulation admitted into evidence by the Tax Court.

See:

(Trans. of Record, pages 34, 35 and 40).

The testimony of Paul Kershaw, Jr., is consistent with the Stipulation and is uncontradicted.

See:

(Trans. of Record, pages 131-168).

Thus, the conclusion and opinion of the Court that Azevedo and Kershaw operated the winery for John Azevedo in consideration of the receipt of salary and compensation for their services, that there was no written partnership agreement between Azevedo and Kershaw, forms the entire basis for the Court's opinion and compels the Court to find that there was no

partnership between Azevedo and Kershaw and that the contracts of December 1, 1945 (Exhibit "1A", Exhibit "2B"), were clear and unambiguous agreements establishing the place where the fruits of the business conducted by the parties belonged. This is entirely inconsistent with the Stipulation of Facts admitted into evidence.

See:

(Trans. of Record, pages 70-71);

(Trans. of Record, page 74).

A more detailed examination of the error committed by the Court in making its findings and rendering its decision on an assumption of facts inconsistent with the testimony and the Stipulation admitted into evidence will be developed later in this Petitioners' Brief.

II.

THE EARNINGS FROM THE OPERATION OF THE BUSINESS KNOWN AS MILLS WINERY BETWEEN MARCH 4, 1946 AND AUGUST 6, 1946, WERE TAXABLE TO MILLS WINERY, A CALIFORNIA CORPORATION.

On March 4, 1946, Mills Winery, a California corporation, was incorporated under and by virtue of the laws of the State of California, and commenced the operation of its corporate affairs and businesses immediately thereafter. On March 4, 1946, the corporation purchased from Robert Azevedo and Paul Kershaw, Jr., copartners, who were theretofore doing business under the firm name and style of Mills

Winery, all the assets of the copartners, and did then and there assume all of the copartnership liabilities. The partnership prepared its closing return upon the dissolution thereof, closing its partnership books, and the corporation opened its books for the commencement of its corporate affairs. The closing inventory of the copartnership consisting of wine, was the opening inventory of the corporation on the date of its incorporation.

After the organization of the corporation, the wine that was purchased from the copartners was ready for sale on the open market and the wine was thereafter sold between March 4, 1946 and to June of 1946. The sole activity of the corporation in connection with the wine in existence was the sale of same. The corporation did not until after August 7, 1946, distill fruit spirits or manufacture wine. The wine when it was acquired by the corporation was acquired at one instance from a single purchase from the copartners and it was sold to various purchasers in bulk.

At the time the corporation was organized and during the period of time that the wine was sold, the corporation did not have any basic permits authorizing the corporation to manufacture wine or to distill fruit spirits from the necessary governmental authorities. These permits were in the name of John Azevedo, and it was not until May 3, 1946, that the corporation made its application to the Federal authorities for the issuance of a basic permit authorizing the corporation to manufacture wine and to distill fruit spirits, which

would be necessary for the 1946 crush and the sale of wine in 1947. The activities of the corporation in selling the wine that they purchased from the copartners did not require any permit from either the State of California or the United States Government.

The permits required by corporations engaged in the manufacturing of wine, distilling of fruit spirits, and the engaging in business of purchasing for resale at wholesale, wine, requires two separate types of permits. One permit is necessary in order for a corporation to engage in the business of distilling spirits or producing wine. The other permit requires a corporation to be licensed for it to engage in the business of purchasing for resale at wholesale distilled spirits or wine.

(27 USCA Sec. 203 Sub. (b) (1));

(27 USCA Sec. 203 Sub. (c) (1)).

The corporation, Mills Winery, did not become engaged in the business of manufacturing wine or distilling spirits until it did receive a permit on August 7, 1946. The corporation did, however, sell wine which was purchased by it from one instance from the copartners on March 4, 1946, and by reason thereof it did not require any permit. The corporation was engaged in the business of selling wine that it had on hand, which did not require a permit from the United States Government or from the State of California.

Malt Products Co. v. United States (1946), 153 Fed. 2nd 5;

Eastman v. United States (1946), 153 Fed. 2nd 80.

Therefore, the activity of the corporation was lawful regardless of the fact that a basic permit stood in the name of John Azevedo at the time sales were made by the corporation.

It should be noted by the court that in reality John Azevedo, although on record having a permit, it could have been determined that no later than May 3, 1946, and as early as April 4, 1946, lost his permit and that the corporation, Mills Winery, the owner of wine, was selling said wine without the necessity of a permit and regardless of the existence of a valid permit in the name of John Azevedo or any other person.

(27 USCA Sec. 204 Sub. (g)).

It should likewise be noted by the Court that even if the Court felt that the existence of a permit in the name of John Azevedo had some bearing on the determination of the validity of the assessment made by the Commissioner against the petitioners that the Act under which these permits are issued, namely, *the Federal Alcohol Administration Act*, 49 Stats. 977, does not prohibit the successor of an existing permittee to operate under the existing permit when an application is filed within a specific time required by statute. The corporation here, however, by approximately Thirty (30) days, failed to comply within the statutory time but the fact that such may be done indicates to the Court that this is not a case where the activities are *malum in se*.

(27 USCA Sec. 204 (g)).

To finally dispose of the question of the license, if we assume for the purpose of argument that Mills

Winery, a California corporation, was conducting activities in the sale of wine which were in violation of Federal and/or State statutory requirements, this does not permit the Court to disregard the corporate entity and to determine that the income earned during the period in question is not properly allocable to the corporation. Income is taxable to an individual or a corporation where the facts justify the assessment against such corporation or individual, regardless of the legality of the transaction which gave rise to the income.

Barker v. United States, 26 Fed. Supp. 1004;
Patterson v. Anderson, 20 Fed. Supp. 709.

The primary question then for this court to decide is whether or not the corporation, Mills Winery, had any "flesh on its bones" or was it a mere shell or sham during the period in question.

The doctrine of corporate entity fills a useful purpose in business life, whether the purpose be to gain an advantage under the laws of the state of incorporation or to comply with the demands of creditors, or to serve the creator's personal or undisclosed purpose, so long as that purpose is the equivalent of a business activity and is followed by the carrying on of business by the corporation. If such occurs, the corporation remains a sound, separate, taxable unit.

Moline Properties v. Commissioner, 319 U.S.
 436.

The respondent had admitted that the corporation, almost immediately after its incorporation, held its

first organizational meeting. (Stip. Par. 9; Trans. Record, page 38); that contracts were entered into between the corporation and certain persons in connection with distilling fruit spirits during the 1946 fruit season (Stip. Par. 10, Ex. 6F; Trans. of Record, page 38); contracts were entered into between the corporation and the Southern Pacific Co. (Stip. Par. 10, Exs. 12 and 13; Trans. of Record, page 38); a grant deed was executed and dated June 21, 1946, by John Azevedo and Frances Azevedo as grantors and the corporation as the grantee (Stip. Par. 11; Trans. of Record, page 39); that corporate expenditures were made and corporate obligations were incurred between March 4, and June 1946, all of which were paid out of the bank account which was drawn upon by John Azevedo until August 1, 1946; that bank loans that were assumed by the corporation when purchasing the assets from the copartnership composed of Robert Azevedo and Paul Kershaw, Jr., were paid from the corporate bank account; that warehouse obligations, expenditures for improvements, alterations and additions to the winery were made by the corporation from March 4, 1946, to August 1, 1946, which were paid from this single bank account (Stip. Pars. 12 and 13; Trans. of Record, pages 39-40); employees were employed by the corporation, who represented the corporation in their corporate employment capacity from April 1946 (Stip. Par. 17; Trans. of Record, page 4); that all sales of wine that were made during the period from March 4, 1946 to August 6, 1946 were recorded as corporate gross profit and that all expenditures that were made from and after March

4, 1946, were paid as corporate expenditures, and that the books of the corporation were opened on March 4, 1946 and the gross income from and after March 4, 1946, and the expenditures made from and after March 4, 1946, were recorded and picked up as corporate transactions (Stip. Par. 23; Stip. Par. 25; Exs. 4D, 11K; Respondent's Answer Sub. Par. (p) of Par. 5; Trans. of Record, pages 40, 42-43; 25).

The corporation reported in their income tax return and the amended return for the fiscal year beginning March 4, 1946 and ending March 3, 1947, all the income earned as a result of the sale of the wine by Mills Winery that arose from the wine manufactured from the 1945 crush. (Stip. Par. 22, Exs. 4D, 11K; Trans. of Record, page 42).

Thus, the corporation did carry out admittedly various corporate activities. The fact that the corporation did not have all of the elements that go into the "bundle of sticks" attributed to a complete and unequivocal activity as a corporation, did not detract from the fact that admittedly the corporation was not a mere shell or sham. The Courts cannot reasonably ignore the existence of a corporation if it is an immutable fact.

Crocker v. Commissioner of Int. Rev., 34 Fed. 2nd

64. In order for a corporation to be a separate jurial person, it is necessary that a corporation must engage in some industrial or commercial activity. Thus even though a corporation has been called a "shell", if the "shell" has some industrial or commercial activity connected there-

with, it is in business as a business activity, which the courts cannot disregard and must recognize as a separate taxable unit.

National Investors v. Koey, 144 Fed. 2nd 466. Only under very exceptional circumstances can the separateness of the corporation from the stockholder be disregarded, even when there is just one stockholder.

Ross v. Commissioner Int. Rev., 129 Fed. 2nd 310. The fact that a corporation did not keep any books, did not have any bank account, that it used a name similar to a predecessor copartnership, that the same books were kept by a copartnership and then by a successor corporation, the fact that certain assets being used by a corporation in its corporate activities stand on record in the name of an individual shareholder, would not permit the court to ignore the separateness of the corporation as a taxable entity from its shareholders.

Moline Properties v. Commissioner, *supra*;

Crocker v. Commissioner Int. Rev., *supra*;

Vaughan Lumber Co. v. U. S., 103 Fed. 2nd 885;

Burnet v. Clark, 287 U.S. 410;

Dalton v. Bowers, 287 U.S. 404;

Burnet v. Commonwealth Imp. Co., 287 U.S. 415.

Standard Oil Co. v. United States, 130 Fed. Supp.

821. The courts are not concerned with refinements of title and the nonexistence of certain of the elements relating to the corporate activity that the respondent has contended by reason of

their absence has made the corporation a mere sham and shell. What was done with the income, the command over the income, and the realities of the relationships between the parties, will determine the taxable entity.

Austin v. Commissioner of Internal Revenue, 161

Fed. 2nd 666;

Fordyce v. Helvering, 78 Fed. 2nd 525.

The fact that there were no formal words of assignment or transfer of the assets and liabilities by the copartners to the corporation on the day of its incorporation, namely March 4, 1946, is immaterial. The admitted facts are that the wine was sold and that the profits were used for corporate obligations. The uncontradicted testimony is that the wine was sold by Paul Kershaw, Jr., on behalf of the corporation as an officer in charge of sales. Thus, from the uncontradicted testimony, and the admissions which were set forth in the stipulation, the intention of the parties was clear, and that is enough. There is no evidence, nor any testimony, that there was any fraud involved, and thus, fraudulent pretenses being absent, the government accepts the taxpayer as it represents itself to be, and thus, represented as a corporation, it must make its return and pay its taxes accordingly.

The Tax Court seemed to place some emphasis upon the fact that issuance of stock by Mills Winery, a California corporation, was not authorized and issued until October 2, 1946. The only apparent intention that the Court would have in referring to this factor

in arriving at a decision that the corporation was not the taxable entity and entitled to the income arising from the sale of the wine during the period as set forth herein, would be that the mere failure to issue corporate shares within a certain period of time would constitute an abortive attempt to organize a corporation.

This, however, is not the law of the State of California. California has recognized that the failure on the part of the directors to obtain a stock permit does not make of them a copartnership or a joint adventure. Thus, corporate activities conducted by the corporation as found by the Court and as contained in the Stipulation of Facts (Trans. of Record, pages 33, 34, 38, 39, 40, 42 and 43; Trans. of Record, page 149) evidently could not be diminished, or their weight and competency reduced, merely because stock was not issued until after August of 1946.

See:

Vogel v. Bankers Building Corporation, 112 Cal. App. 2nd 160;

Blanchard v. Kaull, 44 Cal. 440;

I. W. Williams Co. v. Leong, 44 Cal. App. 296.

Apparently, once again the Court completely disregarding the Stipulation of Facts admitted into evidence concludes that the wine inventory when the same was sold was still owned by John Azevedo and that Robert and Kershaw were in the nature of mere employees receiving the net profit as compensation for services rendered to John Azevedo. This is the illog-

ical conclusion drawn by the Court from facts which do not sustain the Court's findings and as a matter of fact, contrary to the stipulation entered into between the petitioners and respondent which was admitted into evidence. The income was produced by property owned by the corporation at the time the income arose and thus, it was taxable to the corporation and returned and so reported by the corporation.

See:

Blair v. Commissioner, 300 U.S. 5.

It is submitted therefore that from all the evidence before this Court consisting of both oral and documentary in addition to the stipulations it is contradicted that the representations to the business world were that the wine from March 4, 1946, to June, 1946, when substantially disposed of was being sold by the corporation. The fact that the income to the corporation resulted from the personal services of the same persons who were previously copartners does not minimize the existence of the corporation as a jurial entity.

Fontaine Fox, 37 B.T.A. 271;

Esmond Mills v. Commissioner of Internal Revenue, 132 Fed. 2nd 753.

The corporation, Mills Winery, therefore, and not the petitioners as individuals, properly reported the earnings resulting from the sale of wine in 1946.

III.

THE EVIDENCE BEFORE THE TAX COURT CONSISTED OF STIPULATION OF FACTS, EXHIBITS, TESTIMONY OF KERSHAW AND ROBERT C. BURNSTEIN. THE COURT DISREGARDED THE TESTIMONY OF KERSHAW, THE STIPULATION OF FACTS AND SUPPLIED FACTS INCONSISTENT WITH BOTH THE STIPULATION OF FACTS AND THE TESTIMONY TO ARRIVE AT ITS DECISION.

The Stipulation of Facts entered into between petitioners and respondent provided in its opening statement as follows:

“It is hereby stipulated by and between the parties hereto by their respective counsel that the following facts shall be taken as true without prejudice to the right of either party to introduce other and further evidence not inconsistent therewith.”

(Trans. of Record, pages 32-33).

Certain important stipulations were entered into which formed the basis upon which the petitioners proceeded and which have established an unsurmountable admission on the part of the respondent. This, the petitioners respectfully believe may have been recognized by the Court when arriving at its decision but unfortunately, it is not for the Court after such stipulations and admissions have been admitted into evidence to disturb the admitted evidence to be considered by the Court. Specifically, the stipulation established certain major premises which were distinguished by the Court in its decision. These stipulations are as follows:

1. *“Immediately thereafter and commencing August 1, 1945 the said Paul Kershaw, Jr. and*

Robert J. Azevedo conducted the operations in connection with the crushing of grapes for the manufacturing of wine and carried out said operations to and including March 1, 1946 as copartners at which time the said Robert J. Azevedo and Paul Kershaw, Jr. had prepared for filing with the Internal Revenue Department of the United States a partnership income tax return. That attached hereto and marked Exhibit 3C is a photostatic copy of the U. S. Partnership Return of Income prepared for filing by Paul Kershaw, Jr. and Robert J. Azevedo with U. S. Treasury Department for the period beginning August 1, 1945 and ending March 1, 1946."

(Trans. of Record, pages 34, 35).

2. *"That attached hereto and marked Exhibit 4D and made a part hereof as if set forth in full herein is photostatic copy of the amended corporation income tax return for the fiscal year beginning March 4, 1946 and ending March 3, 1947. That said Exhibit 4D reflects that the inventory at the beginning of the corporate Fiscal Year, namely March 4, 1946, amounted to \$445,467.09 which was the same amount that was reflected in the partnership return of income as the closing inventory of said copartnership on March 1, 1946 as is more specifically set forth in Exhibit 3C hereinbefore referred to."*

(Trans. of Record, pages 34-35).

3. *"A financial statement prepared for the partnership on March 3, 1946 and prior to the date of incorporation of Mills Winery, a California Corporation, shows the following:*

*Paul Kershaw, Jr., and Robert J. Azevedo
d.b.a. Mills Winery, Route 2, Box 2851B, Sac-
ramento, California,*

Financial Statement

March 3, 1946

Assets—

Inventory	\$445,467.09
Plant and Equipment	108,225.19
Land	5,000.00
Deferred Charges (Insurance)	1,542.82
	<hr/>
	\$559,235.10

Liabilities—

Capital National Bank (O.D.)	\$ 2,246.01
Accounts Payable	310,734.01
Accrued Taxes	55.08
Notes Payable	136,200.00
Reserve for Depreciation	None
Investment	110,000.00
	<hr/>
	\$559,235.10

Prepared without audit

Prepared by National Accounting Service,
Los Gatos''.

(Trans. of Record, pages 35-36).

4. "All monies withdrawn by John Azevedo from said bank account prior to March 4, 1946 were used to pay the obligations of Paul Kershaw, Jr. and Robert J. Azevedo as copartners and all monies withdrawn by John Azevedo after March 4, 1946 from said bank account and all expenditures that were made thereafter were made for the benefit of the corporation which came from the Bank account except the payments made to John

Azevedo . . . That all bank loans, warehouse obligations and expenditures for improvements, alterations and additions made on the winery premises and the equipment therein that were paid prior to August 1, 1946 were paid by checks drawn by John Azevedo from the single bank account and that all payments that were made after August 1, 1946 were paid by Paul Kershaw, Jr. from the same bank account."

(Trans. of Record, page 40).

5. "That all sales of wine made during the period March 4, 1946 to August 6, 1946 were picked up as corporate gross profit. All expenditures made from and as of March 4, 1946 were paid as corporate expenditures and that the books from March 4, 1946, the date of the incorporation of Mills Winery, a California corporation, to this date have been without interruption reporting all sales, expenditures and assets of the corporation, Mills Winery, a California corporation."

(Trans. of Record, pages 42, 43).

The basic premises upon which the Court makes its decision can be found in the following facts contained in the Court's findings and in its opinion which opinion and findings when compared with the above stipulation of facts are inconsistent therewith and thus cannot be considered as sufficient to sustain the findings and decision of the Court.

1. Contrary to Stipulation "1" above as specifically quoted, the Court made the following findings:

"During the period January 1, 1946 to August 1, 1946, the net earnings of the winery business

known as Mills Winery amounted to \$202,113.82 and these earnings were derived from the sales in the months of March through June, 1946 of the wine made from the 1945 crush. These earnings represented Fifty Per Cent (50%) to each or \$101,056.91 to each, compensation and salary to Robert Azevedo and Paul Kershaw, Jr., respectively for his services in the operation and management of the business known as Mills Winery and for their respective service in making and selling of wine from the 1945 crush . . .”

(Trans. of Record, page 63).

“There was no written partnership agreement between Robert and Kershaw.”

(Trans. of Record, page 70).

“And under the provisions of Paragraph ‘3’ of the agreement of December 1, 1945, Robert and Kershaw had the right to the net proceeds of the sales as their salaries for their personal services in managing and operating the *sole proprietorship business of John Azevedo and in making and selling the wine produced during the period of management by Robert and Kershaw.*”

(Trans. of Record, page 74).

It is thus apparent that the Court, disregarding the conduct of the parties which was admitted to be such conduct that a partnership was entered into between Robert and Kershaw, based its entire decision or at least the major premises upon which the decision was arrived at on the theory that the agreement of December 1, 1945 was controlling, notwithstanding

the stipulation that was admitted into evidence. The agreement of December 1, 1945 had absolutely no probative value to prove that a relationship other than a partnership existed between Robert and Kershaw commencing August 1, 1945. It seems that the Court finds it necessary to disregard the testimony of Kershaw at the time of the hearing and the Stipulation of Facts in order to use the December 1, 1945 agreements as a starting point and then on that basis since a partnership cannot be found arrive at the conclusion that there could not have been any transfer of assets to the corporation from whence the income was produced. In this regard the Court was substantially in error.

2. Contrary to the stipulation of "2" above, as specifically quoted, the Court made the following findings:

"Although Robert and Kershaw caused a corporation to be organized on March 4, 1946, there was no written assignment by Robert and Kershaw or their interest in the agreement of December 1, 1945 to the Corporation and there was no written evidence of assumption by the Corporation of any of the obligations of Robert and Kershaw as purchaser of the real estate and improvements making up the winery premises under the agreement of December 1, 1945."

(Trans. of Record, page 71).

"The mere statement in the corporation income tax return for the period March 4, 1946 to March 3, 1947 which was prepared for the corporation that the corporation had an inventory in the amount of \$445,467.09 on March 4, 1946 is not

competent proof that the corporation in fact acquired and owned inventory of wine which was sold through March through June, 1946 from which sales the income in question was derived.”

(Trans. of Record, page 72).

The stipulation which contained the portion quoted in Paragraph “2” above which was admitted into evidence and the testimony of Paul Kershaw, Jr., which is the only testimony before the Court, is competent proof before the Court that the inventory of the wine owned by the partnership which was admitted by the respondent was sold and transferred to the Corporation prior to the production of income from the sale thereof. See: (Trans. of Record, pages 131-166).

The Court had to completely disbelieve Kershaw which, as the judge of the creditability of a witness, the Court has done, but the Court could not disregard completely nor find inconsistent therewith the facts admitted to be true in the Stipulation. Whether the statements made by the Corporation in its original or admitted return from March 4, 1946 to March 3, 1947 were self-serving or not, that is not the question. This is inconsistent proof to establish a fact upon the admission of the same into evidence by the Stipulation. Therefore, the statement in the corporate return, which was likewise admitted into evidence (Exhibit 4D and Exhibit 11K), is sufficient proof as far as this case is concerned to establish the facts set forth therein. This is especially true when we consider that the respondent had the burden of proof in this case.

3. Contrary to the Stipulation "3" above as specifically quoted, the Court made the following findings:

"It cannot be concluded that Robert and Kershaw owned the inventory of wine which they contend they conveyed to the corporation as of March 4, 1946."

(Trans. of Record, page 73).

"There was no sale of the wine inventory to Robert and Kershaw before the wine was sold and they could not convey the wine inventory to the corporation."

(Trans. of Record, page 72).

Once again the Court, by admitting into the evidence the Stipulation of Facts, which included the Paragraph "3", quoted above, took as competent binding evidence upon the Court that the partnership, consisting of Robert and Kershaw, had a wine inventory of \$445,467.09 prior to the date of the incorporation. This was the same inventory that was reported by the Corporation as its opening inventory and thus, the consistent logical transfer from a partnership to a corporation is reflected in the admitted evidence before the Court.

4. Contrary to the Stipulation marked "4" above, as specifically quoted, the Court made the following findings:

"There was no bank account opened in the name of the corporation as of March 4, 1946."

(Trans. of Record, page 75).

“Furthermore, the authority to draw checks on the bank account of the winery business remained exclusive in John until August 1946 and until then, Petitioners had no authorization to make withdrawals from the account.”

(Trans. of Record, page 75).

Although the Court, in its findings that can be found in the Transcript of Record, page 59, makes a specific finding identical to Paragraph “4”, quoted above, the Court draws a conclusion therefrom in its opinion that the failure to have a separate account in the name of the Corporation and in the name of the partnership to distinguish the secure entities was proof that no such partnership was in existence and further, that the Corporation was not the owner of the assets from whence income was produced. Such a conclusion is inconsistent with the findings and contrary to the admitted fact that, notwithstanding separate and distinct bank accounts, a single bank account was used for partnership obligations during the period of the partnership and for corporate obligations during the period of the Corporation.

The Court cannot disregard the statement in the Stipulation of Facts that all monies withdrawn by John Azevedo from the bank account prior to March 4, 1946 were used to pay the obligations of Robert and Kershaw as copartners nor can the Court disregard the fact that all monies that were withdrawn from this single bank account after March 4, 1946 were used to pay the obligations of the corporation. By giving mere lip service to a finding which must be

taken as true by the Court, and arriving at a conclusion which is inconsistent with and *irreconcilable* with the admitted evidence would do violence to stipulated facts and admitted uncontradicted evidence.

5. Contrary to the Stipulation "5" above as specifically quoted, the Court made the following findings:

"The assertion that the sales of wine in the months March through June of 1946 were made on behalf of the corporation is not supported by any independent proof that this was a fact. For example, books and records of the corporation were not introduced into evidence."

(Trans. of Record, page 72).

"There is no proof that all or part of the net earnings of the winery derived from the sales of the inventory of wine during March through June, 1946, came into the possession of the Corporation."

(Trans. of Record, pages 74, 75).

The stipulation of facts that contained the provisions as quoted above in Paragraph 5, unfortunately had a poor choice of language. The stipulation stated that all sales of wine made during the period of March 4 to August 6, 1946 were "picked up" as corporate gross profit.

It is respectfully believed however that this stipulation itself would be sufficient to sustain the position of the petitioners. Although the choice of language used by both counsel for petitioners and respondent was not the best, the common usage of the term gross

profit "picked up" clearly imported that the gross income arriving from the sale of the wine and thus the resulting net income earned therefrom was considered by and received by, reported by and earned by the corporation.

This finding by the Court which leads the Court to the conclusion that the petitioners had dominion and control over the income is inconsistent with and contrary to the admitted evidence.

This same question as to the corporation receiving income from the sale of wine as corporate income from March 4, 1946 was likewise alleged in the Petition filed by the petitioners for review by the Tax Court.

(Trans. of Record, page 12).

This particular paragraph in the Petition for Review and redetermination filed by the petitioners with the Tax Court was admitted by the respondent in his answer to said Petition.

(Trans. of Record, page 25).

Even the Court recognizing the ambiguity of the words "picked up" recognized that the admission contained by the answer of respondent to petitioners' Petition and the Stipulation of said facts appears to be an admission by the respondent.

(See: Trans. of Record, page 66).

The very nature of the admission by the respondent, both in the pleading stipulation and in the evidentiary stage found in the Stipulation of Facts, would seem to finally dispose of the respondent's position without

anything else before the Court that the income should have been reported by anyone other than Mills Winery, a California corporation which did report said income.

This is especially pertinent since the respondent had the burden of proof before the Tax Court.

Therefore, it is respectfully submitted that based upon the very admissions of the respondent and upon the uncontradicted testimony of Kershaw, the findings of the Court are not supported by any evidence and that the decision of the Court is strained, illogical and apparently, nothing more than the attempt by the trial Court to reconstruct evidence to support the burden of the respondent which under the law and the rules of evidence cannot be done.

IV.

THE THREE YEAR STATUTE OF LIMITATIONS ON ASSESSMENTS AND COLLECTIONS BAR THE ASSESSMENT OF THE DEFICIENCY AS DETERMINED BY THE RESPONDENT AGAINST THESE PETITIONERS. THE RESPONDENT HAS NOT SUSTAINED THE BURDEN OF PROOF IN PROVING ANY ALLEGED OMISSION FROM THE GROSS INCOME OF THE PETITIONERS.

The petitioners filed their income tax returns for the taxable year 1946 in 1947. Under Sec. 275(a) Internal Revenue Code the notices of deficiency would have to have been mailed in March 1950. The deficiency notices however were not mailed until May, 1953. Thus, more than three years expired after the returns were filed. By reason of the lapse of time,

the burden of proof is on the respondent to prove that the petitioners have understated their gross income and the amount includable therein was in excess of Twenty-Five Per Cent (25%) of the amount of the gross income stated in the return in order to take advantage of the extension of the statute of limitations to five years.

Jacobs v. United States, 126 Fed. Supp. 154 at 159 where the Court held:

“For the year ending October 31, 1944, a different rule must apply. When the Commissioner of Internal Revenue made his assessment for that year the normal three year statute of limitations had already expired and the Commissioner was relying on the five year statute of limitations applicable in cases where the taxpayer has understated his income by more than 25% of the amount of his return. To avail himself of this longer limitation period the Commissioner must assume the burden of proving that the taxpayer has understated his income by more than 25% . . . since the government has not sustained its burden or proof the three year statute of limitations precluded a lawful assessment of that year.”

It is submitted that from the evidence that has been introduced and from the stipulations that were made and filed with this Court, the respondent has not sustained his burden of proof that the petitioners have understated income properly includable in their income by more than 25% of the income reported in their returns. To the contrary, the case seems to have

been more the result of a fishing expedition by the respondent than proof of sufficient weight and preponderance to put into effect the five-year statute of limitations. Therefore, since the respondent has not sustained his burden of proof, the three-year statute of limitations has precluded a lawful assessment against the petitioners for the year 1946.

In passing, it should likewise be noted that the five-year period which would go into effect if the respondent has sustained his burden of proof, as required to bring this section into play, would have expired in March of 1952. In order to take advantage of a period in excess of the five-year period the respondent has offered into evidence waivers signed by the petitioners prior to the expiration of the five-year period, that is, prior to March, 1952. The petitioners herein respectfully submit that the waivers that were executed after the three-year period expired were ineffective. The waivers were filed in January and in February, 1952, approximately five years to the month from the return date of the petitioners' 1946 Income Tax Returns.

Kohlhase v. Commissioner of Internal Revenue,
181 Fed. 2nd 331;

*Commissioner of Internal Revenue v. Oswego &
Syracuse Railway Co.*, 62 Fed. 2nd 518.

Recently however the Tax Courts of the United States have been confronted with a problem somewhat similar to the case now before this Court in connection with consents extending the period of limitation. It has been held that where consents extending the

period of limitation were executed more than three years but less than five years after the return due dates, the timeliness of the deficiency notice depended on whether or not the five-year statute of limitations was applicable.

Ray Gasper, June 30, 1953 (T.C. Memo. Op. Dkt. 32252).

However, it is respectfully submitted that this rule in the *Ray Gasper* case (*supra*) requires reexamination. To permit the execution of consents after the expiration of the normal three-year statute of limitations, but before the expiration of the five-year statute of limitations that may come into play because of an alleged under-statement of income would subject the taxpayer to the unnecessary vicissitudes of a trial which is contrary to the purpose of the statute of limitations. If the Court finds that the five-year statute of limitations does not apply, then the consents executed after the three-year statute would be invalid. This seems to be a somewhat illogical rule and contrary to the general rule on limitations of actions and waiver thereof. There is nothing wrong to compel the agents of the Internal Revenue Department to obtain consents prior to the expiration of the normal period of the statute of limitations in order to assist the government in their investigations and administration towards the collection of taxes. The extension of this rule as was enunciated in the *Ray Gasper* case (*supra*) is contrary to the general purposes of a statute of limitations and contrary to cases that were decided previously. Thus, the rule

should be as it has been and that is, consents to be effective must be executed prior to the expiration of the three-year statute of limitations.

Charles E. Sorensen v. Commissioner of Internal Revenue, May 1954, 22 T.C. 321.

CONCLUSION.

It is therefore respectfully submitted that the decision of the Tax Court entered May 7, 1956, wherein said Court affirmed the determination of the respondent that petitioners were indebted as a result of personal income tax liability was in error and that the decision of said Court be reversed and that a judgment be entered by this Honorable Court determining that the net income arising from the sale of wine from March through June, 1946, was income belonging to Mills Winery, a California Corporation, which said income was properly includable in the income reported by said corporation to the U. S. Government.

Dated, Oakland, California,

February 11, 1957.

ROBERT C. BURNSTEIN,

Attorney for Petitioners.

